

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL F. TAGLIAFERRI and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, New York, NY

*Docket No. 98-2602; Submitted on the Record;
Issued October 26, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity as a personnel recruiter.

On December 17, 1985 appellant, then a 35-year-old support service supervisor, injured his back while moving a desk and file cabinet in the performance of duty. The Office accepted the claim for a central disc protrusion at L5-S1, sprain lumbar region, herniated lumbar disc with radiculopathy. Appellant was placed on the periodic rolls and received compensation for wage loss.

On April 26, 1996 appellant's case was transferred to a vocational rehabilitation specialist. Because the employing establishment could not rehire appellant, he was approved for a job development plan whereby he would obtain a Bachelor of Arts degree and seek a position with his qualifications as a Human Resource Specialist. Appellant subsequently received his degree in August 1997.

In a work evaluation report dated September 9, 1997, Dr. Frank Segreto, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant could return to sedentary work for eight hours a day, with no lifting, bending or squatting and a 20-pound lifting restriction.

In a notice of proposed decision dated April 19, 1998, the Office advised appellant that his compensation would be reduced based on a finding that he had the capacity to earn the wages of a personnel recruiter at the rate of \$435.39 per week. Appellant was given 30 days to submit additional evidence or argument relevant to his capacity to earn wages in the position described.

By letter dated May 15, 1998, appellant stated his opposition to the proposed reduction in his compensation benefits.

In a decision dated May 20, 1998, the Office reduced appellant's compensation benefits effective May 20, 1998 based on his capacity to earn wages in the selected position of a personnel recruiter.

The Board finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity as a personnel recruiter.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect his or her wage-earning capacity in his disabled condition.² Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.³ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁴

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.⁵ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report listing two or three jobs that are medically and vocationally suitable for the employee and proceed with the information from the labor market survey to determine the availability and wage rate of the position.⁶

In the present case, the Office received information from appellant's attending physician, Dr. Segreto, that appellant was able to perform sedentary work for eight hours per day. Because

¹ See 5 U.S.C. § 8115(a); *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

² *Sylvia Bridcut*, 48 ECAB 162 (1996); *Betty F. Wade*, 37 ECAB 556, 565 (1997).

³ *Albert L. Poe*, 37 ECAB 684, 690 (1986).

⁴ *Id.*

⁵ *Richard Alexander*, *supra* note 1.

⁶ *Sylvia Bridcut*, *supra* note 2.

the employing establishment was unable to rehire appellant, the Office properly referred appellant for rehabilitation services. In a report dated March 30, 1998, an Office rehabilitation counselor reviewed appellant's medical and vocational restrictions and determined that he was able to perform the position of personnel recruiter (DOT 166.267-038), which was a sedentary job with no more than a ten pound lifting requirement. The rehabilitation counselor determined that the position was available in sufficient numbers so as to make it reasonably available in appellant's commuting area⁷ with a median wage of the position was \$665.00 per week.⁸

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications in determining that the position of personnel recruiter adequately reflected appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of personnel recruiter and that such a position was reasonably available in his commuting area. Although appellant was not hired as a personnel recruiter during the 90 days of rehabilitation services he received, his inability to find a job does not establish that the selected position was not reasonably available.⁹ Therefore, the Board concludes that the Office properly relied on the position of personnel recruiter to determine appellant's wage-earning capacity and to reduce his compensation effective May 20, 1998.

⁷ He specifically noted that appellant held a Bachelor of Arts degree that met the entry-level requirements for a job as a personnel recruiter and for other jobs in the human relations field. He further stated that there were eleven openings for a personnel recruiter position during the week of March 20, 1998 as reported by the State of New York Department of Labor.

⁸ Appellant contested that this wage was a reasonable reflection of the jobs available to him. The Office subsequently determined that the minimum weekly wage for the position of personnel recruiter was \$435.39.

⁹ See *Karen L. Lonon-Jones*, 50 ECAB __ (Docket No. 97-155, issued March 18, 1999); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1999). The determination of availability is made by a vocational rehabilitation specialist based on evidence from the state employment agency or similar source. See *Alfred R. Hafer*, 46 ECAB 553 (1995).

The decision of the Office of Workers' Compensation Programs dated May 20, 1998 is hereby affirmed.

Dated, Washington, DC
October 26, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member